



Outlaws of the University of Michigan Law School

Statement Supporting Proposed Amendment MCR 1.109

In our society, the courtroom is the stage of justice upon which the community seeks resolution to often deeply personal issues. As such, it must be a place where dignity and respect extend to every individual. The Michigan Code of Judicial Conduct, the Michigan Rules of Professional Conduct, and the Rules of Etiquette and Conduct for the Michigan Supreme Court all reflect this view. Canon 2 of the Michigan Code of Judicial Conduct notes that “[a]t all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person’s race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.” Similarly, Rule 3.5(d) of the Michigan Rules of Professional Conduct prohibits lawyers from “enag[ing] in undignified or discourteous conduct toward the tribunal.” The Rules of Etiquette and Conduct for the Michigan Supreme Court set the standard that all other courtroom visitors “must conduct themselves in a manner that recognizes and protects the dignity of the proceedings.”

Transgender and gender non-binary individuals deserve the same dignity and respect as every other person who appears before the court. Members of the trans community have historically faced oppression in the legal system, from laws criminalizing their existence to individuals within the system erasing trans identities by deadnaming and misgendering transgender and gender nonconforming people. As a society, we have made small steps toward rectifying these wrongs. Instructing the members of our legal system to use the preferred pronouns for individuals before the court would be a step in the right direction. Not only would this rule bring Michigan courts into compliance with established rules of conduct, but it would also align court rules with existing legal principles.

The 14th Amendment's Equal Protection Clause has played a crucial role in safeguarding the rights of marginalized communities, including transgender individuals. This amendment guarantees equal protection under the law for all citizens, and since its ratification in 1868, the courts and Congress have applied it to various aspects of public life.

In line with the ideals established under the 14th amendment, federal and state courts have included gender identity as a protected class under certain foundational laws. In *Frontiero v. Richardson*, the Supreme Court of the United States held that sex-based classifications are inherently suspect and must, therefore, be subjected to a more stringent level of scrutiny. 411 U.S. 677, 690 (1973). More recently, in *Bostock v. Clayton Cty.*, the Supreme Court held that Title VII of the Civil Rights Act of 1964's employment protections extend to transgender individuals. 140 S. Ct. 1731, 1742 (2020). Similarly, in *Rouch World, LLC v. Dep't of C.R.* the Michigan Court of Claims held that the Elliott-Larsen Civil Rights Act's prohibition of discrimination "because of sex" includes discrimination based on gender identity. 510 Mich. 398, 409 (2022). The court followed *Bostock*'s reasoning that discrimination based on gender identity presupposes a preference for certain gender roles and characteristics. Therefore, to discriminate against someone for their gender identity also implies discriminating against them based on sex.

These cases, coupled with the recent amendment explicitly expanding the Elliott-Larsen Civil Rights Act to protect against discrimination based on sexual orientation and gender identity, unequivocally establish the illegality of discrimination based on gender identity in Michigan. As such, the proposed amendment to MCR 1.109 is consistent with protections against sex-based discrimination, including discrimination based on gender identity.

Opponents of this rule change may argue that the First Amendment protects the right to speak freely in public, including the right to refer to another person they way they see fit. However, it is well-

established that courts have the authority to restrict what parties can and cannot say in the courtroom. The Michigan Code of Judicial Conduct, the Michigan Rules of Professional Conduct, and the Rules of Etiquette and Conduct for the Michigan Supreme Court all reflect the view that speech can be regulated to ensure the “integrity and impartiality of the judiciary.” The court can even regulate speech in its courtroom to ensure efficient and fair administration of justice such as the prohibition against evidence that is more prejudicial than probative, the utilization of hearsay, and the use of inflammatory rhetoric. *See People v. Blackston*, 751 N.W.2d 408, 413 (2008); *People v. Gursky*, 786 N.W.2d 579, 587 (2010); *Sheppard v. Maxwell*, 384 U.S. 333, 357 (1966).

Therefore, the First Amendment cannot be used to justify speech that is inconsistent with the judicial ideal of integrity and impartiality in the courtroom. Our Nation’s courts should be respectful to all parties involved, ensuring that all individuals before the court are afforded equal protection under the law. As such, the courts may regulate speech to protect the rights of historically oppressed groups. *See Estate of Grable v. Brown (In re Dudzinski)*, 667 N.W.2d 68, 72 (2003).

As future lawyers, we see a need for the profession to show sensitivity to the diverse range of experiences and identities that people bring to the legal system. How can we convince a transgender or gender nonconforming client to trust that they will receive fair treatment by the legal system if we cannot assure them that the judge will at least use their preferred pronouns? How will transgender and gender nonconforming lawyers provide their best representation to clients if judges and opposing counsel misgender and disrespect them during proceedings? How will transgender and gender nonconforming lawyers become respected and effective judges in a system that permits discriminatory behavior against their gender identities?

At the end of the day, you do not need to understand someone else in order to show them the basic respect and dignity every person deserves as a human right. If nothing else, remember the golden rule: treat others how you wish to be treated. If we expect all members of the community to treat the court and its representatives with respect, judges, lawyers, and other members of the legal system must in turn treat the individuals before the court with that same respect.

